

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 04-2875

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UNITED STATES OF AMERICA

v.

DAWN PENZERA,

Appellant

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. No. 03-cr-00171)  
District Judge: Honorable Terrence F. McVerry

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Submitted Under Third Circuit LAR 34.1(a)  
February 13, 2006

Before: SCIRICA, *Chief Judge*, BARRY and FISHER, *Circuit Judges*.

(Filed February 14, 2006)

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OPINION OF THE COURT

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FISHER, *Circuit Judge*.

Appellant Dawn Penzera challenges the legality of her sentence under *United States v. Booker*, 125 S. Ct. 738 (2005). Because our decision in *United States v. Davis*,

407 F.3d 162 (3d Cir. 2005), controls this case, we will vacate Penzera's sentence and remand to the District Court for resentencing.

I.

As we write only for the parties, we will relate only the facts relevant to our disposition of the case. On January 12, 2004, Penzera pled guilty to two counts of unauthorized use of an access device in violation of 18 U.S.C. § 1029, and on June 15, 2004, she was sentenced to concurrent prison terms of 51 months on each count, three years' supervised release, and \$6,838.19 in restitution.

II.

In *Davis*, this Court adopted the policy of remanding for resentencing all cases pending on direct review when *Booker* was decided, in which the defendant was sentenced under the mandatory Sentencing Guidelines regime that existed prior to *Booker*. *Davis*, 407 F.3d at 165. We explained that

[b]ecause the sentencing calculus was governed by a Guidelines framework erroneously believed to be mandatory, the outcome of each sentencing hearing conducted under this framework was necessarily affected. Although plain error jurisprudence generally places the burden on an appellant to demonstrate specific prejudice flowing from the District Court's error, in this context – where mandatory sentencing was governed by an erroneous scheme – prejudice can be presumed.

*Id.*

Our practice, therefore, is to vacate and remand all sentences imposed in which the District Court acted under the mandatory Guidelines framework, so that all sentencing

issues may be properly resolved in the first instance by the District Court in light of *Booker*.

### III.

*Booker* was decided on January 12, 2005, one year after Penzera's guilty plea and six months after her sentence was imposed. Because Penzera was sentenced under the mandatory Guidelines framework, *Davis* requires that her case be returned to the District Court for resentencing. Accordingly, we will vacate the judgment of the District Court and remand the case for resentencing in light of *Booker*.